Supreme Court, U.S.
FILED
AUG 26 2002
OFFICE OF THE CLERK

No. 01-1243

(7)

IN THE

Supreme Court of the United States

BORDEN RANCH PARTNERSHIP;
ANGELO K. TSAKOPOULOS,
Petitioners,

v.

UNITED STATES ARMY CORPS OF ENGINEERS;
and UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE AMERICAN FARM BUREAU FEDERATION AND THE ALABAMA, ALASKA, FLORIDA, IDAHO, ILLINOIS, KANSAS, LOUISIANA, MONTANA, NEBRASKA, NEW HAMPSHIRE, NEW YORK, NORTH DAKOTA, OREGON, PENNSYLVANIA, RHODE ISLAND AND SOUTH CAROLINA STATE FARM BUREAU FEDERATIONS IN SUPPORT OF PETITIONERS

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WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

24 pp

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With the written consent of the parties given and filed with the Clerk of the Court, the American Farm Bureau Federation, Alabama Farm Bureau Federation, Alaska Farm Bureau, Inc., Florida Farm Bureau Federation, Idaho Farm Bureau Federation, Illinois Agricultural Association, Kansas Farm Bureau, Louisiana Farm Bureau Federation, Inc.,

Montana Farm Bureau Federation, Nebraska Farm Bureau Federation, New Hampshire Farm Bureau Federation, Inc., New York Farm Bureau, Inc., North Dakota Farm Bureau, Oregon Farm Bureau Federation, Pennsylvania Farm Bureau, Rhode Island Farm Bureau Federation, Inc., and the South Carolina Farm Bureau Federation (hereinafter collectively referred to as "Farm Bureau") respectfully submit this brief as *amici curiae*.[1]

INTEREST OF *AMICI CURIAE*

The American Farm Bureau Federation (AFBF) is a voluntary general farm organization formed in 1919 and organized in 1920 under the General Not-For-Profit Corporation Act of the State of Illinois. AFBF was founded to protect, promote and represent the business, economic, social and educational interests of American farmers and ranchers. AFBF has member organizations in all 50 states and Puerto Rico, representing more than 5 million member families. The Alabama Farm Bureau Federation, Alaska Farm Bureau, Inc., Florida Farm Bureau Federation, Idaho Farm Bureau Federation, Illinois Agricultural Association, Kansas Farm Bureau, Louisiana Farm Bureau Federation, Inc., Montana Farm Bureau Federation, Nebraska Farm Bureau Federation, New Hampshire Farm Bureau Federation, Inc., New York Farm Bureau, Inc., North Dakota Farm Bureau, Oregon Farm Bureau Federation, Pennsylvania Farm Bureau, Rhode Island Farm Bureau Federation, Inc., and the South Carolina Farm Bureau Federation, are constituent members of AFBF, representing the interests of farmers and ranchers in their respective states.

[1] Counsel for *amici curiae* have authored this brief in whole and no other person or entity other than *amici*, their members or counsel have made a monetary contribution to the preparation or submission of the brief.

Farm Bureau's farmer and rancher members produce virtually every agricultural commodity produced commercially in the United States. They own or lease significant amounts of land on which they depend for their livelihoods and upon which all Americans rely for food and other basic necessities. In recent years they have become increasingly subjected to restrictive laws and regulations that impair their ability to farm and ranch efficiently, and, in some instances, have eliminated their ability to farm and ranch altogether. The protection of wetlands under Section 404 of the CWA poses one of the more onerous regulatory problems production agriculture faces today.

Section 404 of the CWA, 33 U.S.C. § 1344, regulates "the discharge of dredged or fill material into the navigable waters at specified disposal sites." From its inception in 1972 and its court ordered expansion in 1975, the Section 404 permit program remains a most controversial, complex and contentious program. Its application and misapplication to farms and farming have played a key role in its evolution.

Farm Bureau has a direct interest in the outcome of the instant case. Farm Bureau has followed the wetland protection evolution for nearly three decades and watched it take on a life of its own as it marched relentlessly up the hill consuming ever-dryer land. Those forces which did not succeed in getting federal land use control legislation in the late 1960s and early 1970s have seized upon the Section 404 wetlands program as a mechanism to control as much of the landscape as possible. The federal agencies, especially the Environmental Protection Agency, Corps of Engineers and the Fish and Wildlife Service, with the aid of the courts, have been happy to cooperate in expanding the reach of the Section 404 wetlands program.[2] The Ninth Circuit has now expanded

[2] A prime example of the Corps willingness to interject itself into matters of local land use regulation is the situation which gave rise to this Court's decision in *Solid Waste Agency of Northern Cook County v. U.S.*

the reach of Section 404 regulatory jurisdiction to activities that Congress clearly never intended to be regulated.

Farm Bureau's farmer and rancher members have been severely restricted in the productive use of their farm and ranch lands by the Ninth Circuit's crabbed interpretation of Section 404(f) of the Clean Water Act (CWA)—an interpretation that eviscerates the Congressional exemption of normal farming practices from the burdens of the CWA's Section 404 permit program. The Ninth Circuit's construction of the statute's exemption and "recapture" provisions expands the reach of the CWA far beyond what Congress intended, at best creating uncertainties about permissible conduct and at worst exposing farmers and ranchers pursuing routine farming activities to substantial penalties.

Farm Bureau urges this Court to reverse the Ninth Circuit's decision to correct its unjustified narrowing of a legislative exemption expressly intended to shield farmers and ranchers from excessive entanglement with overzealous bureaucratic agencies.

STATEMENT

Petitioner, Borden Ranch, located near Sacramento, California, was fined $1.5 million at the behest of the U.S. Army Corps of Engineers (Corps) for deep plowing agricultural lands, that contained wetlands and had been used to grow

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Corps of Eng'rs., 531 U.S. 159 (2001). There the Corps lent its federal regulatory powers to opponents of a proposed solid waste landfill to override state and local approvals therefor by finding jurisdictional wetlands to exist under its overly broad "migratory bird rule." Given the Corps' propensity to become involved in local land use regulation today, one is given cause to wonder if the instant case isn't the result of the Corps lending its federal regulatory powers under Section 404 to the side of the antis in the California "grape war" described by Joseph Kahn in his April 14, 2002 New York Times' article entitled "Lawsuits in Eden; Fury Over Napa Vineyards."

forage crops, to prepare the soil for higher value, deep rooted crops. The Corps asserted jurisdiction over this plowing under Section 404 of the Clean Water Act (CWA).

A 2 to 1 majority of the Ninth Circuit upheld the Corps' assertion of Section 404 jurisdiction ruling that deep plowing resulted in a "discharge" (plowing) of "pollutants" (plowed native soil) from a "point source" (the plow). In so ruling, the Ninth Circuit erroneously rejected, among others, petitioner's argument that its plowing activities were exempt from regulation under the provisions of Section 404(f) which expressly exempt "normal farming . . . and ranching activities such as plowing." The Ninth Circuit erroneously ruled that the so-called "recapture" provision of Section 404(f) can make "even normal plowing" and "any farming activity" regulable when it "changes a wetland's hydrological regime."

Dissenting Judge Gould would have correctly held "that the return of soil in place after deep plowing" does not produce a regulated "discharge" because it does not involve any "addition" of material to the site. He would have correctly held that the "farmer exemptions" apply to deep plowing even assuming for sake of argument that it did produce a regulated "discharge." Judge Gould stated that the "crux of this case is that a farmer has plowed deeply to improve his farm property to permit farming of fruit . . . more profitable than grazing" and that farmers have engaged in such agricultural activities and pursuits "from the beginning of our nation."

Farm Bureau submits that Congress in the CWA never intended that plowing or any other normal farming activity on agricultural lands containing wetlands would fall within the scope of federal Section 404 regulatory jurisdiction and penalties. To the contrary, Congress clearly confirmed this intent in the broad "normal farming" exemption provisions of Section 404(f).

Neither plowing nor any other normal farming activity was a regulatory issue under Section 404 until the Corps made it one through exaggerated statements of potential regulatory impacts made for the purpose of gaining political support for limiting its jurisdictional responsibility to traditionally navigable waters. The Corps was initially reluctant to extend its new dredge and fill regulatory authority under Section 404 of the Federal Water Pollution Control Act Amendments of 1972 (FWPCA) beyond traditionally defined navigable waters, such as lakes, large rivers and intercoastal waterways. Stine, *Regulating Wetlands in the 1970s,* Journal of Forest History, April 1983, at 65. Senior Corps officials were convinced that Congress intended the Corps to so limit its dredge and fill regulatory activities for fear that "[a] broader interpretation of section 404 . . . would be tantamount to federal land use control." *Id.* at 66. Consequently, the Corps was surprised and disappointed when Judge Aubrey F. Robinson, Jr., ruled in *Natural Resources Defense Council, Inc. v. Callaway*, 392 F. Supp. 685 (D.D.C. 1975) that "navigable waters" extend to "the maximum extent permissible under the Commerce Clause of the Constitution" and are "not limited to the traditional tests of navigability" and directed the Corps to revise and expand it regulations. *Id.*

The Department of Justice refused to appeal and the administration gave the Corps no policy guidance. Corps officials realized that any challenge to the court ordered expansion of Section 404 regulatory jurisdiction would have to take place in the political arena. *Id.* at 67. On May 6, 1975, the Corps issued a news release calculated to ensure maximum outcries over proposed regulations drafted in cooperation with the Environmental Protection Agency (EPA) and environmental groups and published for public comment on the same date. Most notably, the press release warned:

> [F]ederal permits may be required by the rancher who wants to enlarge his stock pond, or the farmer who wants to deepen an irrigation ditch or plow a field, or the mountainer who wants to protect his land against stream erosion.

The release further warned that "millions of people may be presently violating the law" and "may be subject to fines up to $25,000 a day and one year imprisonment." *Id.*

The anticipated firestorm was quick to follow as the story was picked up by newspapers across the country. Environmental groups viewed the news release as a deliberate attempt by the Corps to sabotage the court ruling and were concerned that the political forces unleashed by the Corps might well indeed lead to the overturn of the decision by Congress. Outcries from the agricultural and forestry communities were particularly pronounced, especially after the Secretary of Agriculture began a campaign against the extended regulations. *Id. at 68.*

Responding to the furor raised by the May 6, 1975 news release, the Corps backtracked from its exaggerated impacts statements by including in its regulatory definitions of "dredged material" and "fill material" an *exclusion* for "[m]aterial resulting from normal farming, silvaculture [sic], and ranching activities, such as plowing, cultivating, seeding, and harvesting, for the production of food, fibre, and forest products. 33 C.F.R. § 209(d)(4) and (6) (July 25, 1975). As the Corps made clear in the preamble to those regulations, material resulting from these practices was neither fill nor dredged material and, thus, was excluded from regulation under Section 404. This exclusion, among others, written into the Corps' 1975 regulations, and concurred in by the EPA, became the catalyst for the statutory *exemptions* enacted by Congress as Section 404(f) of the 1977 amendments to the FWPCA (which amendments also redesignated the FWPCA as the "Clean Water Act" (CWA)).

It is important to note that Congress *exempted* what the Corps, with the blessing of the EPA, had already *excluded*. In

other words, Congress said that any discharges of dredged or fill material resulting from normal farming practices were exempt from regulation whereas the agencies had already said these practices were not a discharge of dredged or fill material in the first place. There is nothing in the statute or legislative history to suggest that Congress intended to no longer treat these practices as exclusions. In fact the legislative history indicates that it was the intent of the Congress to endorse the agencies' exclusions and did not intend to draw a distinction between an *exemption* and an *exclusion.*[3]

As the legislative record clearly indicates, Congress was responding to the furor of its agricultural constituency when it enacted the "normal farming" exemption in 1977. It was the intent of Congress to put Section 404 regulatory matters back to where they were before the Corps' exaggerations opened Pandora's box in its effort to limit its jurisdictional responsibilities to traditional navigable waters. Congress was making it clear with the broad "normal farming" exemption provisions that it never intended to regulate plowing or any other normal farming activity under Section 404 when it enacted the FWPCA in 1972.

The legislative record also clearly shows that the caveat which Congress included in the so-called, but mislabeled "recapture" provision of Section 404(f), was for the limited

[3] Congressman Hammerschmidt, for example, stated: "On the positive side, we will now have for the first time statutory recognition that normal farming, ranching and silviculture activities do not belong in this permit program. *These exemptions reemphasize that Congress never intended these activities to be considered discharges of dredged or fill material."* [Emphasis added.] House debate, December 15, 1977. Report on Resolution Providing for Consideration of Conference Report on H.R. 3199, Clean Water Act of 1977, p. 351. And Senator Baker: ". . . First the conference bill clarifies *the exclusion of activities that do not involve point source discharges of dredged or fill material, such as plowing*, seeding, cultivating, harvesting, and upland conservation and minor drainage practices. . . ." Senate debate, December 15, 1977. *Id.* at 524.

purpose of precluding the "normal farming" exemption from being misconstrued as authorizing the conversion of wetland areas to agricultural uses where none could otherwise have been undertaken. Because the farming exemption was written so broadly, there were fears expressed by Congress' environmental constituents that it could be construed to allow the filling and conversion of otherwise untillable wetlands as long as it was for agricultural purposes. Section 404(f)(2) was added to dispel such concern. Further, it clearly was not intended to "recapture" anything, but rather merely to preclude the farming exemption from being used as justification to fill and otherwise manipulate wetlands to convert them into new agricultural lands suitable for tilling, such as the situation involved in *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897 (5th Cir. 1983), where bulldozers and backhoes were employed not merely to plant crops, but to perform earthmoving, excavation and ditching activities with engaged blades and shovels to dry out water bodies.

Thus, the Ninth Circuit's narrow construction of the "normal farming" exemption and its expansion of the "recapture" provisions of Section 404(f) do not comport with the relevant statutory or regulatory language, history or practical realities. The unjustified results of the Ninth Circuit's decision for production agriculture are:

1. The decision drastically narrows the normal farming exemption of Section 404(f)(1) and places the U.S. Army Corps of Engineers and the Environmental Protection Agency in the business of regulating day-to-day farming and ranching practices.
2. The decision makes a farmer or rancher's plow a point source of pollution.
3. The decision finds that normal agricultural plowing results in the discharge of dredge and fill pollutants.

4. The decision expands the Section 404(f)(2) "recapture" provision to the point where a farmer or rancher will not be able to change his cropping patterns or commodity mix without a permit from the federal government or significant concern of a substantial penalty for violating the Clean Water Act.

Farm Bureau urges this Court to correct the Ninth Circuit's errors and to restore the "normal farming" exemption to the broad scope originally intended by Congress.

ARGUMENT

I. DEEP PLOWING IS NORMAL PLOWING AND A NORMAL FARMING ACTIVITY EXEMPT FROM REGULATION BY CWA SECTION 404(f)

Congress made a deliberate policy choice when it enacted the broadest possible exemption for normal farming activities like plowing from regulation under Section 404. Congress provided that no permit is required for "the normal farming, silviculture, and ranching activities such as plowing, seeding, cultivating, minor drainage, harvesting . . . or upland soil and water conservation practices," or "for purposes of construction or maintenance of . . . irrigation ditches, or the maintenance of drainage ditches." 33 U.S.C. § 1344(f)(1)(A), (C).

Plowing was recognized in the exemptions as a normal farming activity, but beyond that it was not otherwise described in either statutory language or legislative history. That is because it was common knowledge that plowing is a normal farming activity and it was also commonly known that farmers and ranchers employ many types of plowing in the normal conduct of their production agriculture activities that vary with location, climate, types of soils, types of crops, developing technology and a whole host of other variables. That is why, for instance, when the U.S. Department of Agriculture conducts its periodic survey of the nation's

agricultural resources, its lists 16 different types of plowing (including "deep ripper") for its interviews to use in tabulating plowing activity by farmers and ranchers. See, *i.e.*, *Agricultural Resource Management Study (ARMS), Phase II—Production Practices, Interviewer's Manual*, U.S. Department of Agriculture, National Agricultural Statistics Service,

Nowhere is there a definition of plowing as to a particular type of plowing, or maximum depth to which plowing may be performed or the frequency plowing must be performed in order to remain within the realm of a normal farming activity that Congress intended to exempt. Similarly, nowhere is there any inference that plowing should ever be so defined. Normal plowing is that which farmers and ranchers employ to meet their production agricultural needs. In other words, normal plowing would be a matter for the agricultural community to determine. That is why, among other reasons, it is ludicrous and beyond the Corps or EPA's authority to specify depths and frequencies of exempt plowing as they did in their December 12, 1996 Field Memorandum on "Deep ripping." RGL. No. 96-02, Army Corps of Engineers and Environmental Protection Agency, December 12, 1996. The Corps is not the arbiter of what production agriculture activities are "normal."

As indicated above, "deep ripping" is but one of numerous types of normal plowing that farmers and ranchers routinely employ in the conduct of their production agricultural activities. The basic purpose of "deep ripping" is to provide hardpan penetration (a basic purpose and result of all types of plowing) *and* at the same time form root beds that allow ample plant root development as well as water infiltration and retention.

The term "deep ripping" can refer to plowing that involves depths ranging from a few inches for such crops as lettuce, soy beans, wheat, cotton, and pumpkins, to several feet for

grape vines and fruit trees. See *i.e.*, Rester, *Subsoiling to Increase Cotton Yields,* Louisiana State University, Ag Center Research & Extension (deep ripping 12 to 15 inches to fracture hardpans); *2001 Virginia Cotton Production Guide*, Virginia Cooperative Extension Service, Virginia Tech (ripping and bedding 6 to 9 inches); *For More Soybeans, Dig Deep*, Agriculture Research, February 1999 (deep tillage to a depth of 12 to 16 inches); *The Mid-Atlantic Wine Grape Grower's Guide*, North Carolina State University (subsoiling 18 to 24 inches); *Irrigating Deciduous Fruit and Nut Trees in Oregon*, Oregon State University Extension Service, May 1996 (deep ripping to 4 feet). It is also a recommended practice by both state agricultural extension services and environmental quality agencies for not only improved crop yields, but also for disease control and water conservation and quality control. See *i.e.*, *Minimum tillage practices affect disease and yield of lettuce*, California Agriculture, January-February 2002 (deep ripping 15 to 20 inches); *Small Ranch*, University of Nevada at Reno (controlling soil erosion due to compacted soil runoff by deep ripping and planting or mulching); *Irrigation Management Practices To Protect Ground Water And Surface Water Quality, State of Washington*, EM4885, Washington State Department of Ecology and Cooperative Extension, Washington State University (rip hardpans and compacted soils to improve filtration rates).

The fact that "deep ripping" may not be performed annually or on a frequent basis does not make it any less a "normal" plowing activity for production agricultural purposes. The frequency with which it is performed depends upon matters such as the degree of compaction of the soil and the needs of the crop to be grown. It may be performed only once in connection with the establishment of a vineyard or orchard, once every several years where no-till practices are used, or it may be performed annually in the growing of row

crops or grains. Frequency is not the determining factor in what constitutes "normal" in production agriculture; crops, conditions, technology and results are.

Thus, depth and frequency of occurrence have nothing to do with normal plowing for purposes of the Section 404(f) agricultural exemption. As previously indicated, the purposes of "deep ripping" are twofold: hardpan penetration *and* root bed preparation. Hardpan penetration usually takes place within a matter of a few inches. Otherwise the depth to which "deep ripping" is to be performed depends upon the root bed needed for the particular type of crop to be planted, and this depth may range from a few inches to several feet. In sum, "deep ripping" is "normal plowing" and a normal farming or ranching activity that is exempted from Section 404 regulation.

II. PASTURES AND FORAGE CROP LANDS ARE ESTABLISHED AGRICULTURAL LANDS

The Ninth Circuit, rubber stamping the interpretation of overzealous regulators, ruled that changing pasture and forage croplands containing wetlands to vineyards and orchard was akin to the conversion of wetland areas to agricultural uses where none had previously existed.

Contrary to the Ninth Circuit's holding, pastures and forage crop lands have always been recognized as agricultural lands. This fact was evident when the National Academy of Science undertook its extensive study of wetland characteristics and boundaries. As stated in their published report:

> Agricultural wetlands are defined here as wetlands found on agricultural lands. Agricultural lands, in turn, are those that are intensively used and managed for food and fiber production and from which natural vegetation has been removed and cannot be used in making a wetland determination. Examples include cropland, hayland, and pasture composed of planted grasses and legumes;

orchards; vineyards; and areas that support wetland crops such as cranberries, taro, watercress, and rice (NFSAM, 1994.).

Wetlands Characteristics and Boundaries, National Academy Press, 1995, at 158.

Further, an examination of the examples of normal farming and ranching activities enumerated in Section 404(f) lends support to the view that Congress did not intend the courts applying the exemption to manufacture artificial distinctions in land usage for various agricultural purposes (such as between pastures and vineyards and orchards). The listed activities include *land preparation* (plowing, seeding), *production* (cultivating, harvesting), and *maintenance* (drainage and conservation). Contrary to the Ninth Circuit's holding, there is absolutely no indication that Congress regarded the precise nature of a farmer or rancher's actions within this wide range of conduct as determinative of the exemptions applicability.

Congress understood the frequency with which farmers and ranchers can, and often must, change and/or diversify their operations to achieve an economically viable or more profitable farming or ranching operation. The transition from one farming or ranching use to another, such as from pasture to planting crops, occurs often in production agriculture. Preparatory activities, which may include draining and plowing and often occur over a period of years, still constitute normal farming and ranching activities.

Pasturing and planting are simply subsets of the myriad activities that comprise "normal farming." Acknowledging this reality, the statute and regulations give farmers and ranchers flexibility to operate within the broad categories of activities (farming, silviculture, and ranching) to which the Section 404 exemption applies, without worrying that the choice between one sort of farming or ranching activity and another on a given piece of land may result in a CWA

violation. The Ninth Circuit's ruling that it is the *particular* existing use of a portion of a farm or ranch that counts in determining if the normal farming exemption applies, not the fact that the land is part of a *continuing farming or ranching operation*, destroys this very necessary flexibility and for practical purposes destroys the exemption.[4]

The Ninth Circuit also wrongly construed the recapture provision of Section 404(f) to extend the reach of the CWA into normal farming activities that Congress intended to leave alone. That provision requires permitting for an activity that "bring[s] an area of the navigable waters into a use to which it was not previously subject." 33 U.S.C. § 1344(f)(2). The statute provides no further elaboration on the meaning of "use," and the conflicting provisions of the implementing regulations simply confuse matters.

On the one hand, the regulations appear to adopt a broad and flexible approach to farming and ranching "uses" and "activities" by specifying that a "permit will be required for the conversion of a cypress swamp to some other use or the conversion of a wetland from a silviculture to agricultural use." 33 C.F.R. § 3323.4(C). This provision implies that a conversion from one agricultural use to another – for example, from irrigated forage crop production and pasturing to vineyards and orchards—would avoid the recapture provision. On the other hand, the regulation states categorically that "[a] conversion of a Section 404 wetland to a non-wetland is a change in use of an area of waters of the United States." *Id.* This latter provision lacks textual or structural support in the CWA, is inconsistent with related regulatory provisions, and, more importantly, conflicts with the intent of

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[4] Of interest in this regard is a statement included by EPA in the preamble to its regulations adopted in 1980 defining exempt "plowing": "Several commentators questioned the requirement that plowing take place on 'established' farm or forest lands. This requirement has been deleted."

Congress. See *E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 138 (1977) ("The question . . . is not what a court thinks is generally appropriate to the regulatory process; it is what Congress intended for these regulations"). Every indication in the statute and regulations, save this one, points to "farming, silviculture, or ranching"—not to "wetlands or non-wetlands"—as the relevant frames of reference for the application of the recapture provision.

Moreover, the legislative history of the normal farming exemption makes clear that Congress did not mean to interfere with the operations of farms and ranches by requiring a permit every time a farmer or rancher makes a change in the productive use of agricultural lands from one crop to another, or from pasture to planting. Congress, as Senator Muskie pointed out, well understood that "draining poorly drained farm[land]" would affect a substantial hydrological alteration to "millions of acres" nationwide. *A Legislative History of the Clean Water Act of 1977: A Continuation of the Legislative History of the Water Pollution Control Act* (1978) at 1042. Yet, as the Senator stated, the 1977 amendments established "once and for all" that no permits are required for such activities. *Id.* Accordingly, the Ninth Circuit's contrary ruling notwithstanding, the recapture provision of Section 404(f)(2) does not remove active and ongoing farming and ranching operations from within the ambit of the normal farming exemption merely because there occurs a change from one agricultural use to another.

III. THE NINTH CIRCUIT NEGATED THE SECTION 404(f) NORMAL FARMING EXEMPTION WHEN IT RULED THAT THE "RECAPTURE" PROVISIONS CAN MAKE EVEN NORMAL PLOWING AND ANY OTHER FARMING ACTIVITY REGULABLE WHEN IT CHANGES A WETLAND'S HYDROLOGY

The Ninth Circuit ruled that the "recapture" provisions of Section 404(f) can make "even normal plowing" and "any farming activity" regulable when it "changes a wetland's hydrological regime." Such activities were deemed to result in "environmental damage sufficient to constitute a regulable redeposit" even when there is no "discharge" and "do not involve the introduction of material brought in from somewhere else." *Borden Ranch Partnership v. U.S. Army Corps of Eng'rs*, 261 F.3d 810, 814, 815 (9th Cir. 2001).

The Ninth Circuit's decision has rendered Congress' legislative effort to exclude plowing and other normal farming activities from the regulatory reach of Section 404 an exercise in futility. The Ninth Circuit has negated the carefully crafted exemption for plowing and other normal farming activities that Congress enacted in 1977 because most normal farming activities and *any and all plowing* will result in a change to a wetland's hydrological regime and will, therefore, never be exempt from Section 404 regulation.

Furthermore, contrary to the Ninth Circuit's ruling, the CWA makes it very plain that the existence of a "discharge" and a "pollutant" are the critical, deciding factors that determine its reach. Section 301(a) prohibits the "discharge of any pollutant" except as authorized by other sections of the Act. 33 U.S.C. § 1311(a). Section 404 is one such exception. Section 404 authorizes the Corps to issue permits for the "discharge of dredged or fill material into the navigable waters at specified disposal sites." 33 U.S.C. § 1344. Section 404 makes it very plain that the existence of a "discharge"

and "dredged or fill material" pollutants are critical, deciding factors in determining its jurisdictional reach.

The Corps' implementing regulations contain a lengthy definition of "discharge of fill material" which provides in pertinent part:

> The term *discharge of fill material* means the addition of fill material into waters of the United States . . . The term does not include plowing, cultivating, seeding and harvesting for the production of food, fiber, and forest products . . . .

33 C.F.R. § 323.2(f).

The EPA's and Corps regulations defining plowing also expressly exclude this activity from regulation under Section 404 as a "non-discharge":

> Plowing means all forms of primary tillage, including moldboard, chilsel, or wide-blade plowing, discing, harrowing, and similar physical means utilized on farm, forest or ranch land for breaking up, cutting, turning over, or stirring of soil to prepare it for the planting of crops . . . Plowing as described above *will never involve a discharge of dredged or fill material.* (Emphasis added.)

EPA regulations 40 C.F.R. 232.3(d)(4) and Corps regulations 33 C.F.R. 323.4(a)(1)(iii)(D). The emphasized language that plowing will never involve a discharge of dredged or fill material first appeared in the Corps' regulations of 1975 and has been included in both agencies regulations since 1980.

Because of continuing disputes and remembering the lashing it took in 1975 for daring to insinuate that Section 404 might apply to plowing, the Corps issued a guidance letter on February 11, 1986 reminding its districts that:

> Plowing for the purpose of producing food, fiber, and forest products and meeting the definition in Section 323.4 will never involve a discharge of dredge or fill material. Such plowing is not subject to any of the provisions of Section 404(f) exception limitations. Section 404(f) is applicable to those activities that do

> involve a discharge but are statutorily exempted from the need to obtain a permit.

RGL 86-01, Army Corps of Engineers, February 11, 1986.[5]

No conflicting guidance to RGL 86-01 was issued until the December 12, 1996 Field Memorandum on "deep ripping" which guidance represented a complete reversal of the Corps' long standing position on plowing and a direct contradiction of it regulations.

The Ninth Circuit's ruling upholding the Corps in this case is in complete conflict with the "discharge" and "pollutant" requirements of the CWA generally and Section 404 specifically. By allowing the EPA and the Corps to assume jurisdiction over plowing and other normal farming activities simply on the basis of their environmental effects, the Ninth Circuit has negated the normal farming exemption provisions of Section 404(f). The Ninth Circuit's decision must be reversed and the integrity of the normal farming exemption restored to American farmers and ranchers as Congress intended.

CONCLUSION

The judgement of the Court of Appeals should be reversed.

Respectfully submitted,

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August 26, 2002

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[5] A copy of RGL 86-01 has been lodged with the Clerk by the Petitioner.